

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 007651
Issued to: Robert F. MCDOWELL

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2396

Robert F. MCDOWELL

This appeal has been taken in accordance with 46 U. S. C. 7702 and 46 CFR 5.30-1.

By order dated 5 October 1984, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's merchant mariner's license for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that Appellant, while navigating the M/V ANANGEL SPIRIT under the authority of the license above captioned, on or about 27 November 1983 while approaching the MacArthur Lock, in the St. Marys River failed to maintain control of the M/V ANANGEL SPIRIT by allowing it to sheer into the path of the M/V INDIANA HARBOR resulting in the M/V ANANGEL SPIRIT colliding with the M/V INDIANA HARBOR.

The hearing was held at St. Ignace, Michigan, on 15 December 1983.

At the hearing Appellant was represented by professional counsel, and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence five exhibits and the testimony of four witnesses.

In defense, Appellant introduced two exhibits, his own testimony, and the testimony of one other witness.

After the end of the hearing, the Administrative Law Judge took the matter under advisement and ultimately rendered a written Decision and Order on 5 October 1984. She concluded that the charge and specification had been proved and suspended all licenses issued to Appellant for a period of three months on twelve months' probation.

The Decision and Order was served 15 October 1984. Appeal was timely filed on 1 November 1984 and perfected on 20 February 1985.

FINDINGS OF FACT

Appellant is a United States registered pilot. On 27 November 1983 he was serving as pilot aboard the M/V ANANGEL SPIRIT under the authority of his license. On that date the M/V ANANGEL SPIRIT was proceeding downstream in the St. Marys river above Sault Ste. Marie, Michigan. The M/V ANANGEL SPIRIT is 539 feet long. It has a right-handed variable pitch propeller. Upon being backed, its stern backs to starboard and its bow swings to port.

As the M/V ANANGEL SPIRIT approached the Soo Locks, Appellant communicated with the Lockmaster for his lock assignment. The Lockmaster assigned the M/V ANANGEL SPIRIT to the MacArthur Lock and advised Appellant that the M/V INDIANA HARBOR was proceeding upstream in the Poe Lock. The Tug CHIPPEWA was alongside the M/V ANANGEL SPIRIT assisting it. The locks are parallel with the Poe Lock to the north and MacArthur Lock to the south. They run downstream west to east. The MacArthur Lock itself, is 800 feet long and 80 feet wide with a depth of 31 feet. There is a 21-foot difference between the height of the river in the lower pool and the upper pool. It takes about 10 minutes for the lock to fill. There is a light at the lock which indicates to the pilots coming downstream whether the MacArthur Lock or Poe Lock is being filled. When a lock is filling, some draw or suction toward the lock takes place. This makes it more difficult to control an approaching vessel and is generally known to the pilots who transit the area.

Appellant intended to land the M/V ANANGEL SPIRIT on the southwest pier wall to await entering the lock. As the M/V ANANGEL SPIRIT approached the extreme west end of the piers, Appellant requested the Lockmaster to stop filling the MacArthur Lock, which was done promptly. Appellant, however, made no request of the M/V INDIANA HARBOR to wait until the M/V ANANGEL SPIRIT had made its landing on the wall. When, as in this case, there is a vessel proceeding upstream in the lock, the Lockmaster, if requested by the approaching vessel proceeding downstream, would hold the vessel in the lock until the approaching vessel had made its landing on the wall.

The M/V INDIANA HARBOR is 1000 feet long with a beam of 105 feet and a molded depth of 56 feet. The Tug CHIPPEWA is 90 feet long with a 26 foot beam.

As the M/V ANANGEL SPIRIT approached the southwest pier where Appellant was intending to land, it was being assisted by the Tug CHIPPEWA which had pushed it to starboard in the direction of the pier. The M/V INDIANA HARBOR was leaving the lock. Appellant intended to approach the pier at an angle of 25 to 30 degrees. When about 18 feet off of the wall, at a speed of about 2 or 3 knots the

M/V ANANGEL SPIRIT took a noticeable sheer away from the pier in a northerly direction. To counter this, Appellant moved the rudder to center and backed the vessel half stern. The M/V ANANGEL SPIRIT, nevertheless, continued its sheer. Appellant then told the Tug CHIPPEWA to push full as he put the M/V ANANGEL SPIRIT full ahead and the rudder hard to starboard; however, by the time the tug got up to pushing full ahead, the M/V ANANGEL SPIRIT had continued ahead and the effectiveness of the tug had dissipated. Although slowing, the sheer continued. As a collision between the M/V ANANGEL SPIRIT and M/V INDIANA HARBOR became imminent, the Operator of the Tug CHIPPEWA dropped the towline and backed out of the way to keep the tug from being crushed between the two ships. Appellant then put the M/V ANANGEL SPIRIT full astern with the rudder to the center to try to take as much headway as possible off and minimize the damage. the Master of the M/V INDIANA HARBOR put his engines in reverse and pushed his bow towards the pier on the north side of the westerly approach to the locks with his bow thrusters. At this time, the M/V INDIANA HARBOR was traveling at approximately 1 m. p. h. over the ground.

At approximately 2057 on 27 November 1983 the M/V ANANGEL SPIRIT collided with the M/V INDIANA HARBOR at an angle of approximately 45 degrees. Both vessels sustained minor damage.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The hearing proceeded on an inadequate specification,
2. The specification was not proved because no specific act of negligence was shown,
3. Various findings of the Administrative Law Judge lack support in the evidence.

APPEARANCE: Anthony E. Andary, Attorney at Law, Moher, Andary & Cannello, P. C., Sault Ste. Marie, Michigan.

OPINION

I

Appellant contends that the specification on which the hearing proceeded was inadequate. I agree. However, reversal is not required under the circumstances of this case.

The specification upon which the hearing proceeded alleged

only that Appellant was negligent for failing to control his vessel resulting in a collision. It did not allege the specific manner in which Appellant was negligent nor that the M/V ANANGEL SPIRIT sheered off of its apparent course into the path of the other vessel. As discussed in Appeal Decision 2358 (BUISET), such a specification is inadequate to enable the person charged to identify the offense so he will be in a position to prepare his defense as required by 46 CFR 5. 05-17(b). A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. See also Appeal Decisions 2277 (BANASHAK) and 2174 (TINGLEY).

Deficiencies in the pleading in Administrative proceedings can be cured where the record clearly shows that there was no prejudice. In Kuhn v. Civil Aeronautic Board, 183 F.2d 839, 841 (D. C. Cir. 1950), it was stated: "there may be no subsequent challenge of issues which are actually litigated, if there was notice and adequate opportunity to cure surprise." This doctrine has been accepted in Suspension and Revocation proceedings. See Appeal decisions 2358 (BUISET), 2166 (REGISTER), and 1792 (PHILLIPS). This, of course, does not mean that an Administrative Law Judge should allow a hearing to proceed on a specification that is not adequate. To do so bears or involves a risk that the individual charged will not be adequately prepared to respond to the Coast Guard's allegations. If this were to occur, findings based on such a specification could not be affirmed. Thus, it is incumbent upon the presiding Administrative Law Judge to insure, at the outset of the hearing, that those specifications upon which the hearing is to proceed contain a clear and sufficient statement of the facts constituting the offense alleged. See 5 U. S. C. 554(b)(3) and 46 CFR 5.05017(b).

Appellant, however, raise this issue for the first time on appeal. The record establishes that the issues below were fully litigated and that there were no surprises or complaints that the specification was vague. It was clear throughout the hearing that the central issue was Appellant's responsibility for the M/V ANANGEL SPIRIT's sheer into the path of the M/V INDIANA HARBOR. Appellant's counsel presented considerable evidence regarding this issue and argued it vigorously.

Because, in this case, the adequacy of the specification is first challenged on appeal, and it is clear from the record that Appellant was not surprised at the hearing but was, in fact, prepared to defend against the Government's allegations, the findings need not be set aside.

Appellant asserts that the finding of negligence may not be sustained because there has been no showing of a specific negligent act or omission on his part. I do not agree.

It is an accepted rule of Admiralty Law that "a 'sheer' or movement of one vessel into the path of another raises a presumption of negligence on the part of the sheering vessel." Harcon Barge Company v. M/V J. B. Chauvin, 487 F. Supp 187, 191 (N. D. Miss. 1979); see also Atkins v. Lorentzen, 328 F.2d 66, 68 (5th Cir. 1964).

At the close of the Coast Guard's case in chief, the evidence showed that the M/V ANANGEL SPIRIT, under the direction and control of Appellant, sheered into the path of the M/V INDIANA HARBOR resulting in a collision between those two vessels. Thus, a prima facie case of negligence had been established and the Administrative Law Judge properly denied Appellant's motion to dismiss the charge and specification. The evidence is also sufficient to support the Administrative Law Judge's ultimate finding of negligence since Appellant has not rebutted the presumption.

Appellant challenges the Administrative Law Judge's finding that there were various things that Appellant might have done to prevent his vessel from sheering into the path of the M/V INDIANAN HARBOR. The comments of the Administrative Law Judge in this regard are fairly supported by the evidence. However, even if some of them were not, the finding of negligence need not[be set aside since they are not essential to it.

Among the things which the Administrative Law Judge observed that Appellant might have done differently are: Appellant might have approached the wall slower so that the sheer forces would have been less severe; Appellant, knowing the nature of his vessel, might have approached the wall at a greater angle since when backed the stern would swing toward the wall and reduce the angle of approach; Appellant might have requested the Lockmaster to stop filling the lock sooner so as to lessen the effect of the suction on his vessel; and, Appellant might have asked the Lockmaster to hold the M/V INDIANA HARBOR in the lock until he had safely made his landing on the approach wall. In essence, Appellant argues that various of these actions suggested by the Administrative Law Judge would, individually and under the exact circumstances of the case, have been inappropriate. Even if true, this does not help Appellant. The record establishes that these actions, either individually, or in various combinations, were common precautions taken by pilots in situations such as Appellant found himself. Even if some of them were inappropriate under the circumstances, the fact that there were any precautions which Appellant could and

should have taken to prevent his vessel from sheering is sufficient. To rebut the presumption, Appellant would have had to show that there were no additional precautions which he should have taken.

In situations such as this, where the evidence may support different conclusions, the conclusion drawn by the Administrative Law Judge presiding at the hearing will not be disturbed unless inherently unreasonable. See Appeal Decisions 2333 (AYALA), 2302 (FRAPPIER), and 2367 (SPENCER). The Administrative Law Judge's findings in this case will not be disturbed.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 5 October 1984 is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C. this 11th day of July, 1985.